PUBLIC PROSECUTOR

v.

KONG FUI PEN

HIGH COURT BORNEO
SYED AHMAD IDID JC
[CRIMINAL APPEAL NO. 20(A) OF 1990]
19 SEPTEMBER 1991

CRIMINAL PROCEDURE: *Section 4(c) Prevention of Corruption Act 1961 (Law of Malaysia Act No. 57) - Section 107 Penal Code - Abetment knowledge and intention - Proof beyond reasonable doubt - Issuance of false invoices in favour of private company.*

The respondent, a Project Manager in Juru Letrik Garuda Sdn. Bhd. had issued two false invoices both made out to one Cyril Yapp who was convicted by the Sessions Court on the charge under s. 4(c) of the Prevention of Corruption Act 1961 and was bound over under s. 294 of the Criminal Procedure Code. The appeal against conviction and sentence by the accused and the Public Prosecutor respectively in that case dismissed on 19 September 1991 (see [1992] 3 CLJ (Rep) 368).

The respondent was charged on two counts under the Prevention of Corruption Act 1961 (Laws of Malaysia Act No. 57) (Revised 1971) and was acquitted and discharged without defence being called.

The Public Prosecutor appealed against the acquittal. He argued that the learned Sessions Court Judge had erred in law and in fact when he held that the prosecution failed to prove a *prima facie* case against the respondent and found that the respondent did not come under one of the definitions of abetment under s. 107 of the Penal Code.

Held:

[1] It was sufficient that by his act, the respondent must have had knowledge and intended to aid or facilitate the commission of a crime.

[2] In this case there is evidence against the respondent which if unrebutted would establish the elements of the crime alleged to have been committed and subsequently go towards his conviction.

[3] The fact the respondent prepared the invoices, had them typed out and issued them using the name of his employers, not caring as to their eventual purpose is sufficient reason to call for his defence on both the offences of s. 4(c) or one of abetment read with s. 107 of the Penal Code.

[Appeal allowed. Respondent's defence was ordered to be called and trial to be continued before the same learned Sessions Court Judge.]

Cases referred to:

PP v. Datuk Tan Cheng Swee & Ors. [1979] 1 MLJ 166 ***(cons)***
Yahaya Abdullah v. PP [1991] 4 CLJ (Rep) 229 ***(dist)***
Haw Tua Tau v. PP [1981] CLJ (Rep) 11 ***(foll)***
Mat v. PP [1963] MLJ 263 ***(foll)***

Legislation referred to:

Criminal Procedure Code, s. 316
Prevention of Corruption Act 1961, s. 4(c)
Penal Code, s. 107

For the appellant - Selvanathan a/l Shanmugham, DPP
For the respondent - Patricia Hiew; M/s. Chau & Thien

JUDGMENT

Syed Ahmad Idid JC:

This appeal was against the decision of the learned Sessions Court Judge Kota Kinabalu on 3 April 1989 whereby the above named respondent who was charged on two counts under s. 4(c) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act No 57) (Revised 1971) was acquitted and discharged without defence being called. The appeal was against the acquittal.

The appeal was heard on 13 June 1991 where the learned Deputy Public Prosecutor, Mr. Selvanathan a/l Shanmugham appeared for the appellant while Miss Patricia Hiew represented the respondent.

The Public Prosecutor provided these grounds:

(1) The learned Sessions Court Judge erred in law and in fact when he held that the circumstances of the case against the respondent did not come under any one of the definition of abetment under s. 107 of the Penal Code.

(2) The learned Judge erred in law and in fact when he found that the prosecution had failed to prove a *prima facie* case against the respondent on this charge.

This was a case of an ex-employee of the Sabah Electricity Board who joined the private sector as a project manager in Juru Letrik Garuda Sdn. Bhd. (Garuda) and issued two false invoice Nos. 000175 (dated 15 January 1987) and 000196 (dated 8 April 1987) each made out in the amount of RM1,720 said to be for "transportation and labour charges" from (i) Kota Kinabalu to Tenom on 5 January 1987; and (ii) Tenom to Kota Kinabalu on 30 March 1987 and both made out to Cyril Yapp.

Cyril Yapp was convicted by the Sessions Court on the charge under s. 4(c) of the Prevention of Corruption Act 1961 and was bound over under s. 294 of the Criminal Procedure Code. He has appealed against conviction and the Public Prosecutor has cross - appealed against the inadequacy of sentence in that case.

Miss Hiew urged upon the Court that any charge as to abetment under the Penal Code (s. 107) at Explanation 2, of the third limb, must prove that it was "intentionally" done and this must connote knowledge. According to her, *PP v. Datuk Tan Cheng Swee & Ors.* [1979] 1 MLJ 166 is correct when it observed that:

> Under the third class of abetment by intentional aid there must be evidence to show that be some act done by the abettor he had intended to aid or facilitate the commission of the principal offence. (At p. 171).

This Court is aware that no case should be tried on suspicion. Here the respondent, in his statement to the Anti-Corruption Agency officer (Exh. P10), stated that he did "not know that Cyril Yapp would use the two invoices to claim from SEB as transport charges incurred." Earlier he had said that he "felt suspicious ... he (Cyril Yapp) told me it was for his own use."

Miss Hiew was of the view that s. 4(c) required the Prosecution to prove two points:

(1) Accused knew the statement was false;

(2) That he intended to mislead.

These were decided in *Yahaya Abdullah v. PP* [1991] 4 CLJ (Rep) 229 (which was cited by both the respondent and appellant). That case differs from our instant case in that Yahaya's defence was that he could make the claims before he moved. Also there were shortcomings in the administration in the Lembaga Padi Negara. The Prosecution there also failed to specify the date in the charge.

The learned Sessions Court Judge in our case here, in his ruling delivered in open Court on 3 April 1989, stated:

> Could the first accused be said to have intentionally aided the second accused in committing the offence so that it would come under the third definition of abetment. While it is true that the act of the first accused in preparing the invoices could be construed as amounting to aiding however once again I have no hesitation to say that there is no proof of intention on the part of the first accused for the simple reason that he did not have the knowledge that the false particulars in the invoices were intended to mislead SEB.

("First accused" here refers to the respondent)

On the one hand, the Sessions Court found that the act of "preparing the invoices could be construed as amounting to aiding..." but on the other hand he also found that the respondent "did not have the knowledge that the false particulars in the invoices were intended to mislead SEB." Knowledge can be derived from two avenues, the knowledge that one possesses and the knowledge that can be obtained from sources which one knows of or ought to know of. In this case the respondent did not care to what use the invoices could be put to though his stint in the SEB and the purpose of the invoice "transportation and labour charges" must have provided him sufficient knowledge of what the invoices were meant for.

Can a reasonable person think of any other use or uses which these invoices could be put to? The inescapable conclusion must be towards Cyril Yapp's submission of them to SEB to claim. Hence, the respondent by his not caring for the end result must have known the purpose by his act of having issued the two invoices. It was sufficient that by his act, the respondent must have intended to aid or facilitate the commission of a claim.

In cases of bribery or corruption, like all other criminal cases, the golden rule is that the Prosecution must prove its case beyond reasonable doubt. The appeal was on the evidence at the end of the Prosecution case; it was not the conclusion of the whole matter. I am of the view that that being so, the authority of *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11 is the determinant in my decision of this appeal today. In that case, Lord Diplock (delivering the judgment of the Privy Council) said:

> Their Lordships recognise, too, that what may properly be regarded by lawyers as rules of natural justice change with the times.

His Lordship continued:

> At the conclusion of the prosecution's case what has to be decided remains a question of law only.

So in any case where there is some evidence (not inherently incredible) which we can accept as accurate, then that would go to establishing the elements of the crime alleged to have been committed. This ties up with the Malaysian case of *Mat v. PP* [1963] MLJ 263 where Suffian J (as he then was) advised Magistrates that "if you accept the explanation given by or on behalf of the accused, you must of course acquit." But here we have the evidence against the respondent which if unrebutted would go towards his conviction.

The fact that the respondent prepared the invoices, had them typed out and issued them using the name of his employers, not caring for what use they were to be put to, was sufficient reason to call for his defence on both the offences of s. 4(c) or one of abetment read with s. 107 of the Penal Code. Accordingly, I alter the decision of the learned Sessions Court Judge to the extent that the respondent's defence be called.

By s. 316 of the Criminal Procedure Code, I order that the respondent's defence be called and the continuation of his trial be arranged early before the same learned Sessions Court Judge.

Also found at [1992] 2 CLJ 1061